LeMond Cycling, Inc. v. Trek Bicycle Corporation Doc. 128

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LeMond Cycling, Inc., Plaintiff, v. Trek Bicycle Corporation, Defendant/Third-Party Plaintiff, v. Greg LeMond, Third-Party Defendant.	Civil No. 08-1010 (RHK-JSM) Judge Richard H. Kyle Magistrate Judge Janie S. Mayeron Date: July 29, 2009 Time: 10:30 a.m. Judge: Magistrate Janie S. Mayeron

MEMORANDUM OF LAW IN OPPOSITION TO TREK'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES, TO DEEM FACTS ADMITTED, AND FOR EXPENSES

Trek has filed the instant motion to compel for one reason: it has no basis for breaching the Agreement with Plaintiff and can only continue to rely on the purported emails from consumers. After realizing that it had not carried its burden of achieving authentication of such documents, Trek attempted to sidestep its obligations and instead ask Plaintiff to suspend common sense and agree that the emails and blog posts from dozens of unknown, individual non-parties to the suit are authentic. Trek's claims that Plaintiff's response to Interrogatory No. 11 are, likewise, without merit since Plaintiff's objections are both warranted and timely.

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BACKGROUND

Trek's Counterclaim and Third-Party Complaint, as well as two of its expert reports, are based, in large part, on the emails Trek received from consumers and dealers. (*See* Trek Compl. ¶¶ 21-23, 33-34, 37; Fox Expert Report, attached as Exhibit A to the Declaration of Jennifer M. Robbins ("Robbins Decl."); Nevin Expert Report, at 8-11, Robbins Decl. Ex. B.) Faced with the problem of eventually having to admit these emails and blogs into evidence, Trek served its Second Set of Discovery on May 8, 2009 seeking not only admissions as to authenticity of the over 13,000 pages of documents produced or created by non-parties to the lawsuit (including the nearly 500 pages of emails and blogs attached to Trek's motion), but also a broad waiver of objections as to admissibility and hearsay. (*See* Stippich Decl. Ex. 1, at 2-3.) Plaintiff responded to Trek's authentication requests by informing Trek that Plaintiff is without knowledge as to the authenticity of the emails and blog posts. (*See* Stippich Decl. Ex. 2, at 4-6.)

At the same time, Trek propounded Interrogatory No. 11 seeking "a detailed factual and legal basis" for "each way in which" Plaintiff contends that Trek breached the Sublicense Agreement with LeMond Cycling, Inc. including "a reference to bates-stamped documents." (Stippich Decl. Ex. 1, at 3.) Plaintiff responded by incorporating its general objections, as well as by specifically objecting "on the grounds that any response to this Interrogatory is pertinent to liability and is therefore appropriately addressed through the opinions of Plaintiff's experts which are not due until the date agreed upon by the parties regarding the exchange of expert reports." (Stippich Decl. Ex. 2, at 9-10.)

As detailed below, Plaintiff's responses are sufficient, and Trek's motion to compel should be denied.

ARGUMENT

I. Plaintiff Has Sufficiently Responded to Trek's Requests for Admission.

In an attempt to distract the Court and reframe the discovery dispute, Trek devotes a full two pages to the recitation and explanation of Rule 36, even going so far as to argue against objections that Plaintiff has never made. (*Compare* Trek Mem., at 8 *to* Pl.'s Resp., Stippich Decl. Ex. 2, at 4-6.) Contrary to the implication set up by Trek, Plaintiff does not object to the use of requests for admission for authentication of documents. The requests at issue here, however, are not standard requests. Rather than seeking authentication of documents such as ordinary business records created by one of the parties, Trek seeks Plaintiff's admission that emails and blog posts – created by dozens of unknown, non-parties to the lawsuit – are authentic.

Rule 901(a) of the Federal Rules of Evidence states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Trek, the proponent of these documents, has failed to provide any indication as to what it claims these documents to be. It is unreasonable for Trek to expect Plaintiff to engage in guesswork as to Trek's claims for 500 pages of documents. Had Trek's Requests for Admission sought Plaintiff's admission that the consumer and dealer emails or blog posts said a particular thing (as is the common use of requests for admission), Plaintiff would have been able to squarely admit or deny the request. Additionally, Plaintiff does not have "such a relationship to the proffered materials that it is likely to know the facts as to genuineness." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 723 F.2d 238 (3d Cir. 1983) *rev'd on other grounds*, 475 U.S. 574 (1986) (reversing summary judgment and holding that the trial judge erred in holding that documents were authenticated against some defendants, generally by their admissions, were not authenticated against them all).

Moreover, Plaintiff is justified in its refusal to authenticate these emails and blogs, as is apparent from other courts' recognition "that authentication of [electronically stored information] may require greater scrutiny than that required for the authentication of 'hard copy' documents." *See Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534, 542-543 (D. Md. 2007) (collecting cases where counsel failed to properly authenticate ESI). For instance, "[w]eb-sites are not self-authenticating" and "[t]o authenticate printouts from a website, the party proffering the evidence must produce 'some statement or affidavit from someone with knowledge [of the website] . . . for example [a] web master or someone else with personal knowledge would be sufficient.'" *St. Luke's Cataract and Laser Inst., P.A. v. Sanderson*, No. 8:06-CV-223-T-MSS, 2006 WL 1320242, at *2

(M.D. Fla. May 12, 2006) (attached at Robbins Decl. Ex. C) (quoting *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 782 (C.D. Cal. 2004)). Not only is Plaintiff without personal knowledge of the creation or compilation of the emails or blog posts, Trek has given no indication that it has such personal knowledge either.

As it stands, Plaintiff has no knowledge about the authors of the blog posts or emails, their maintenance on the websites, or about what Trek claims these documents to be. Plaintiff informed Trek that without further information, Plaintiff would be unable to respond with either an admission or a denial of the requests. (*See* Stippich Decl. Ex. 6.) Rather than provide such information, Trek filed the instant motion.

II. Plaintiff's Objections to Trek's Overly Broad and Unduly Burdensome Contention Interrogatory are Appropriate and Timely.

Despite the "emphasis supplied" in Trek's memorandum (*see* Trek Mem., at 4), it remains clear that in its response to Trek's contention interrogatory, Plaintiff specifically relied on expert discovery – which is still ongoing – and not merely on the pleadings in the case. Furthermore, Plaintiff's overly broad and unduly burdensome objection is far from conclusory. Trek has even cited to the explanation Plaintiff gave for the objection: "it seeks all facts in support of Plaintiff's case, which would require a detailed narrative of Plaintiff's case in response." (Trek Mem., at 7; Stippich Decl. Ex. 6.)

A. Trek's Interrogatory is Overly Broad and Unduly Burdensome.

Trek's attempt to belatedly play wordsmith by insisting that "Interrogatory No. 11 does not seek 'all facts in support of Plaintiff's case'" is unavailing, as patently clear from the request itself, which seeks "a detailed factual and legal basis" for "each way in which" Plaintiff contends that Trek breached the Sublicense Agreement with LeMond Cycling, Inc. (Stippich Decl. Ex. 1, at 3.) This is a breach of contract action. A request that Plaintiff detail the facts for "each way in which" Trek breached the contract amounts to the same thing as a request for all facts in support of Plaintiff's case.

The cases cited by Trek tell the same story. For example, in *Shqeirat v. U.S. Airways Group, Inc.*, Civil No. 07-1513 (ADM/AJB), 2008 WL 4232018 (D. Minn. Sept. 9, 2008), the Court denied the motion to compel further responses to the contention interrogatories (even where the interrogatories were *not* overbroad since they were related to specific allegations), stating that the defendants were not "required to provide a narrative account of its case that Plaintiffs seek through its Interrogatory Requests." *Id.* at *4 (attached at Robbins Decl. Ex. D). The Court went on to state that the requesting party already possessed the documents referenced by the defendants and that "they will have the opportunity for further inquiry into the factual basis of [the defendants'] contentions through depositions." *Id.*

Similarly, the Court in *Mancini v. Insur. Corp. of New York*, Civil No. 07cv1750-L(NLS), 2009 WL 1765295, (S. D. Cal. June 18, 2009) granted the motion to compel further responses but only after modifying the requests in acknowledgment that "[w]hile contention interrogatories are proper, they can impose a large burden. Contention interrogatories are often overly broad and unduly burdensome when they require a party to state 'every fact' or 'all facts' supporting identified allegations or defenses." *Id.* at *3 (attached at Robbins Decl. Ex. E) (citing *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 445, 446-47 (D. Kansas 2000)).

Furthermore, there is not the matter of surprise, as was the Court's concern in another of the cases cited by Trek. *See Transclean Corp. v. Bridgewood Servs., Inc.*, 77 F. Supp. 2d 1045, 1062 (D. Minn. 1999) *aff'd in relevant part, vacated in part*, 290 F.3d 1364 (Fed. Cir. 2002). In *Transclean*, the defendant surprised the plaintiff with a claim that the patent at issue was anticipated by another patent, such that the plaintiff did not find out about the contention until it was too late to conduct discovery on the issues. *Id.* at 1360-61. Here, Plaintiff has never attempted to surprise Trek with its claims. Plaintiff has been direct in its contention – throughout discovery – that Trek breached section 5.02 of the Sublicense Agreement by failing to use its best efforts in the promotion and marketing of the LeMond brand. (*See* Townley Expert Report, Robbins Decl. Ex. F (discussing ways in which Trek failed to adequately support the LeMond brand);

Compl. at ¶¶ 159-162.) And Trek still remains able to conduct expert discovery on the basis for these contentions, since it has yet to depose Plaintiff's liability expert.

B. Plaintiff's Objection was Timely.

Plaintiff appropriately preserved its objections to Trek's overbroad and burdensome interrogatory by incorporating its general objections into its response to Interrogatory No. 11, which was itself served upon Trek in a timely manner. Plaintiff also specifically explained the objection during the parties' meet and confer (*see* Robbins Decl. ¶ 2), as well as in a letter summarizing Plaintiff's position after the meet and confer. (Stippich Decl. Ex. 6.)

III. Plaintiff's Discovery Responses are Substantially Justified.

Federal Rule of Civil Procedure 37(a)(5) states that a "court must not order this payment [of expenses] if . . . the opposing party's nondisclosure, response, or objection was substantially justified." Under Rule 37 "substantially justified has never been described as meaning 'justified to a high degree,' but rather has been said to be satisfied if there is a 'genuine dispute,' . . . or 'if reasonable people could differ as to appropriateness of the contested action. . . ." *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co.*, 142 F.R.D. 677, 679-90 (S.D. Iowa 1992) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). As discussed above, Plaintiff's discovery responses and objections were appropriate. Even after discussing its objections during the meet and confer, Trek failed to provide Plaintiff with information that would enable it to properly agree to authentication of the emails and blog posts. Similarly, Plaintiff's response to Trek's overbroad and unduly burdensome contention interrogatory is proper in light of the ongoing expert discovery on the issue of liability.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court deny Trek's motion.

Dated: July 20, 2009

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